Filed 11/23/16 P. v. Espinoza CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS ESPINOZA, JR.,

Defendant and Appellant.

F072381

(Tulare Super. Ct. No. PCF286601)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Glade F. Roper, Judge. (Retired judge of the Tulare County Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Detjen, J. and Smith, J.

Defendant Carlos Espinoza, Jr., attacked several people with a taser, and three people with a knife, one of whom, Steven Mendoza, died. Espinoza's motivation was apparently that the woman he believed to be his girlfriend, Elisa Mejia, was having a sexual relationship with Mendoza. The other victims apparently interfered with his desire to attack Mejia and Mendoza.

After being charged with first degree murder, attempted murder, and numerous assault counts, Espinoza entered into a plea agreement which required him to plead to second degree murder, one assault count, admit two prior strike convictions, and admit a prior serious felony enhancement for a total indeterminate term of 50 years to life and a determinate term of five years.

Espinoza argues he received ineffective assistance of counsel in the plea negotiations. Specifically, he asserts he wanted to accept a plea which required him to plead to voluntary manslaughter instead of second degree murder. The remaining terms of the plea would be the same, including the sentence to be imposed.

We conclude Espinoza cannot establish defense counsel acted ineffectively, or that he suffered any prejudice. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The testimony at the preliminary hearing established that Mejia dated defendant for about three months, but the dating relationship had ended about a month before the date in question. On the date in question, Mejia and her sister-in-law planned to attend a wedding and then celebrate her sister-in-law's birthday. Mejia asked defendant to accompany them as the sober driver. The three attended the wedding and then went to a bar. Four men with whom Mejia's sister-in-law worked, were at the bar. The two groups merged, and after the bar closed went to Thomas Manning's apartment, one of the men in the group. The group continued to drink and talk. Defendant became upset when one of the men showed some affection towards Mejia. Mejia and her sister-in-law took defendant home, and then returned to the apartment.

About 20 minutes later, defendant returned to the apartment and knocked on the door. When one of the men, David Chavez, opened the door, defendant stunned him with a Taser. Mejia walked to the door and defendant grabbed her and pulled her towards the elevator. Mejia's sister-in-law attempted to intervene on Mejia's behalf. Defendant used the Taser twice on Mejia and twice on her sister-in-law as they struggled to escape from defendant. Mejia and her sister-in-law eventually escaped from defendant and returned to the apartment. Defendant apparently left the building.

Later that night, Mejia and Mendoza ended up in the bedroom of Manning's apartment. Defendant returned to the apartment and entered the bedroom. Mendoza and defendant began fighting. Mejia attempted to separate the two men. Defendant eventually ran out of the bedroom. Mendoza attempted to follow defendant, but fell down near the entrance door. He was bleeding and eventually died of multiple stab wounds, 24 in total. Mejia was stabbed near her armpit during the altercation.

Chavez testified he was with the group of men that encountered Mejia and her sister-in-law at the bar that night. He recalled returning to Manning's apartment and the party continuing. He also recalled the women taking defendant home and then returning to the apartment. Eventually, Chavez returned to his apartment, which was on the same floor as Manning's apartment. Later Chavez exited his apartment and encountered defendant. Defendant stabbed Chavez seven times and then went inside Manning's apartment.

The information charged defendant with the following: (1) first degree murder of Mendoza with a lying in wait special circumstance, (Pen. Code, §§ 187, subd. (a) and 190.2, subd. (a)(15));[1] (2) the attempted murder of Chavez (§§ 187, subd. (a) and 664); (3) assault with a deadly weapon with Mejia as the victim (stabbing) (§ 245, subd. (a)(1)); (4) assault with a deadly weapon with Mejia as the victim (Taser) (§ 245, subd.

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[1] All statutory references are to the Penal Code unless otherwise noted.

(a)(1)); (5) assault with a deadly weapon with Chavez as the victim (Taser) (§ 245, subd. (a)(1)); and (6) assault with a deadly weapon with the sister-in-law as the victim (Taser) (§ 245, subd. (a)(1)). The information also alleged the following enhancements: (1) use of a deadly weapon within the meaning of section 12022, subdivision (b)(1) (counts one and two); (2) two prior strike convictions within the meaning of section 667, subdivisions (b)-(i) (all counts); (3) two prior serious felony convictions within the meaning of section 667, subdivision (a)(1) (all counts); and (4) one prior prison term within the meaning of section 667.5, subdivision (b) (all counts).

The information was filed on February 13, 2014. Defendant was represented by the public defender's office, specifically by Deputy Public Defender Neal Pedowitz, at the preliminary hearing. Defendant was arraigned on February 24, 2014, again represented by Pedowitz. On September 3, 2014, defendant requested a *Marsden* hearing seeking to have different appointed counsel to represent him. On September 17, 2014, the *Marsden* hearing was held and the motion was denied.

On that same day, Pedowitz filed a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 seeking to have one or more of the strike allegations stricken by the trial court. Pedowitz explained the purpose of the motion was an attempt to determine the trial court's position to aid in the plea negotiations. Pedowitz believed that if the trial court struck one or more of the strikes, the two parties could reach a plea agreement that would be more favorable for defendant than the current offer by the prosecutor. The prosecutor filed an opposition to the request, and at the October 24, 2014 hearing the trial court denied the request.

The next filing in the record is a motion to continue the trial filed on or about November 17, 2014, by Deputy Public Defender Stephen Prekoski. The motion stated that good cause existed to continue the trial because Pedowitz had fallen ill, and would not return to work until the middle of January 2015. The motion was heard on December 12, 2014, and was granted by the trial court. Defendant was present at the hearing.

A trial setting hearing was held on January 16, 2015, and defendant was represented by Prekoski. Defendant was present at the hearing, and the matter was continued until May 22, 2015. Although there is no reporter's transcript of the hearing, comments at a later hearing indicate the matter was continued because Pedowitz was still ill, and at the time was not expected to return to the office until May 2015.

The matter was again continued at the May 22, 2015 hearing. Defendant was present and represented by Deputy Public Defender Ben Smukler. No reporter's transcript of this hearing is in the record, but from later comments it appears by this time that Pedowitz had retired from the public defender's office, apparently because of his illness. Smukler was the new deputy public defender assigned to represent defendant.

The next hearing was held on June 5, 2015. Defendant was present and represented by Smukler. A trial date of July 19, 2016, was set.

On June 19, 2015, a pretrial hearing was held. Defendant was present and represented by Smukler. The trial dates were confirmed.

The next pretrial hearing was held on July 10, 2015. At this hearing, a *Marsden* hearing was held. Smukler began by explaining he had become aware of an issue he wanted to bring to the court's attention. He explained that defendant was facing a sentence of life without the possibility of parole, plus many additional years if he was convicted of all counts in the information and all the enhancements were found true. The public defender's file notes indicated that in June 2014, Pedowitz began plea negotiations with the prosecutor assigned to the case. In July 2014, the prosecutor offered a plea agreement which required defendant to plead to second degree murder and receive a sentence of approximately 55 years to life. Later that month, the file notes indicated that Pedowitz met with defendant and the two decided to reject the offer.

The last handwritten note in the file made by Pedowitz was after the *Romero* motion was denied. Shortly thereafter, Pedowitz unexpectedly became ill. Although it was initially anticipated he would return to the office, ultimately he retired. When

Pedowitz became ill, the motion to continue the case was made, and Prekoski reviewed the file to determine if a plea agreement could be reached. Prekoski apparently read the handwritten notes in the file and concluded defendant had agreed to reject the second degree murder plea offer. Prekoski then sent an email to the prosecutor rejecting the offer.

Prekoski was apparently unaware that Pedowitz had also made some file notes in the public defender's computer system, which apparently was very unusual for Pedowitz. Nonetheless, these notes indicated that after the *Romero* request was denied, Pedowitz had continued to negotiate with the prosecutor. A tentative agreement to settle the case was reached which would require defendant to plead to voluntary manslaughter, one assault count, and one five-year prior for a total sentence of 55 years to life (the voluntary manslaughter offer).

In speaking with defendant, Smukler learned that Pedowitz had met with defendant and discussed the offer. Smukler was able to confirm the meeting actually occurred, and that defendant was seriously considering the offer. However, defendant did not give Pedowitz a response because he wanted to discuss the matter with his father before he made a decision. It was anticipated defendant would call Pedowitz the following week with his final decision.

Prekoski was unaware of the voluntary manslaughter offer when he advised the district attorney's office that the current offer was rejected. The prosecutor did not realize Prekoski did not know about the voluntary manslaughter offer that was pending, so he assumed the rejection received from Prekoski referred to the voluntary manslaughter offer. As required by law, the prosecutor advised not only his supervisors of the rejection, but also the victim's family.

When Smukler assumed responsibility for the file, he reopened plea negotiations with the prosecutor. Smukler was informed the last offer was the voluntary manslaughter offer, but the prosecutor would need to obtain approval from his supervisor to make that

offer again. Before the prosecutor would bring the matter up with his supervisors, he wanted to make sure defendant was willing to accept such an offer. Smukler met with defendant and informed him it was extremely unlikely that if he went to trial he would receive a sentence less than the offer made by the prosecutor. Smukler and defendant met on at least two occasions and discussed the offer and the ramifications. Defendant ultimately indicated he was interested in the offer, but again decided he wanted to discuss that matter with his father before making a final decision.

Smukler informed the prosecutor that defendant was interested in the offer. However, when the prosecutor discussed the matter with his supervisors, they rejected the offer. The prosecutor relayed that information to Smukler, but said he thought his supervisors would approve a plea agreement for the same sentence, but defendant would have to plead to second degree murder.

When Smukler relayed this information to defendant, defendant became confused. He thought the voluntary manslaughter offer was the same offer that had always been on the table, not realizing that Prekoski had inadvertently rejected that offer. Defendant added that he had called the public defender's office twice shortly after the voluntary manslaughter offer had been made to inform Pedowitz he would accept the offer, but by then Pedowitz had left the office because of his illness. Smukler then accurately summarized the issue:

> "And so basically the bottom line is that there was an offer. It was relayed to my client. My client did consider it and wanted to accept it, but because of the confusion surrounding Mr. Pedowitz leaving the office and the fact that he didn't write any of this in the file, Mr. Prekoski was not aware of that and we, in essence, rejected the offer out of hand without acting on our client's behalf."

Smukler then cited two cases, *Lafler v. Cooper* (2012) 132 S.Ct. 1376 (*Lafler*), and *Missouri v. Frye* (2012) 132 S.Ct. 1399, which he contended were similar cases that suggested some relief is appropriate.

The trial court also directly addressed defendant. Defendant confirmed he contacted the public defender's office to accept the plea offer, but Pedowitz was out. The trial court then continued the matter to consider the issue.

The next hearing was on July 23, 2015. Smukler began by reiterating that which had been discussed at the previous hearing, this time with the prosecutor present. The prosecutor also reviewed the sequence of events in a manner very similar to the above. He explained that in discussions with the family, he and his supervisors felt that a plea to second degree murder was necessary, but all agreed that the sentence would remain the same as in the voluntary manslaughter offer, 55 years to life (hereafter the second degree murder offer).

The trial court ultimately denied the *Marsden* motion, essentially because defendant did not want new counsel. Defendant stated he preferred the voluntary manslaughter offer, but reluctantly accepted the second degree murder offer. The trial court accepted his no contest plea, and sentenced defendant to the agreed upon term of a determinate term of five years, and an indeterminate term of 50 years to life.

DISCUSSION

Defendant argues he received ineffective assistance of counsel and should be able to withdraw his plea, and then accept the voluntary manslaughter offer.

The Sixth Amendment to the United States Constitution provides a defendant with the right to counsel. The "Due Process Clauses" entitles a defendant to a fair trial. The constitution defines the parameters of a fair trial "largely through the several provisions of the Sixth Amendment." (*Strickland v. Washington* (1984) 466 U.S. 668, 685.) "Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord

defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." (*Ibid.*)

A defendant is entitled to have counsel appointed to represent him or her if he or she cannot afford to retain counsel. (*Strickland v. Washington, supra, 466 U.S.* at p. 685.) Not only is a defendant entitled to counsel, he or she is entitled to effective assistance of that counsel. (*Id*. at p. 686.) Counsel may be ineffective by failing to render adequate legal assistance. (*Ibid*.) "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." (*Id*. at p. 687.)

The standard in this state is well established. "Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.] ¶ Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel's conduct from counsel's perspective at the time. [Citation.] A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] … Nevertheless, deference

is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions." (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.)

The two cases cited by defendant addressed the question of whether the right to effective assistance of counsel included the plea negotiation process. In both cases, the Supreme Court concluded the issue must be analyzed using the *Strickland* framework. In *Frye*, the Supreme Court held the constitution requires a defendant be provided effective assistance of counsel during the plea negotiation process. (*Missouri v. Frye*, *supra*, 132 S.Ct. at pp. 1407-1408.) Effective assistance of counsel required, at a minimum, a duty to communicate formal offers from the prosecution to the defendant. (*Id*. at p. 1408.)

To establish prejudice "where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." (*Missouri v. Frye*, *supra*, 132 S.Ct. at p. 1409.)

In *Frye*, defense counsel failed to communicate a favorable plea offer to the defendant before it lapsed by its terms. Defendant later pled on less favorable terms. Since the facts of the case before us are significantly different, the remainder of the analysis in *Frye* is not particularly relevant.

In *Lafler*, the defendant rejected a plea offer that was communicated to him and proceeded to trial where he was convicted. The resulting sentence was significantly harsher than that provided in the rejected plea offer. The parties stipulated the rejection

of the plea offer was the result of poor advice from defense counsel, thereby conceding the first prong of the *Strickland* analysis. The issue in *Lafler*, therefore, was whether the defendant could establish prejudice, and if so, the appropriate remedy.

In discussing the issue of prejudice, the Supreme Court observed, "Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (*Lafler, supra*, 132 S.Ct. at p. 1385.) Since the defendant was found guilty and sentenced to a significantly greater term than offered, the Supreme Court concluded he was prejudiced as a result of counsel's ineffectiveness. (*Id*. at p. 1391.)

The final question was the appropriate remedy. The Supreme Court refused to adopt a single test for determining the appropriate remedy.

> "Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.' [Citation.] Thus, a remedy must 'neutralize the taint' of a constitutional violation, [citation,] while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. [Citation.]
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> "The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion

> in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.
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> "In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. [Citations.] In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.
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> "In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion. At this point, however, it suffices to note two considerations that are of relevance.
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> "First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial." (*Lafler*, *supra*, 132 S.Ct. at pp. 1388-1389.)

The Supreme Court concluded the appropriate remedy in the case before it was to order the State to reoffer the plea agreement. (*Lafler*, *supra*, 132 S.Ct. at p. 1391.)

Turning to the case before us, we conclude defendant cannot establish either prong of the *Strickland* analysis, i.e., he cannot establish counsel's performance fell below that of a reasonably competent attorney nor that he suffered any prejudice.

We find focusing on defendant's actions, rather than what occurred in the public defender's office, crystalizes the fallacy of defendant's argument. It is true, that if one only looks at the events in the public defender's office it appears that defendant has a reasonable argument. However, we find defendant's actions, or more specifically his lack of action, significant.

To summarize the events, the prosecutor and Pedowitz reached a tentative agreement on the voluntary manslaughter offer. Pedowitz presented the offer to defendant, who wanted time to consider it before either accepting or rejecting it. Pedowitz then went on sick leave. Prekoski, believing he was responding to an earlier offer and not knowing the voluntary manslaughter offer was pending, sent an email to the prosecutor rejecting the offer. Eventually, defendant accepted the second degree murder offer, which consisted of the same amount of prison time as the voluntary manslaughter offer.

Between his final discussion with Pedowitz, and the discussions leading to his acceptance of the second degree murder offer, defendant did not inform anyone in the public defender's office that he wished to accept the voluntary manslaughter offer. Defendant told the trial court he called the public defender's office twice with the intent of informing Pedowitz he wished to accept the voluntary manslaughter offer. But there is no evidence that he left any message for Pedowitz, or informed the public defender's office he wished to accept a pending offer. Moreover, defendant appeared in court with a public defender at least five times, and two of those occasions occurred after the file had been assigned to Smukler. There is no explanation why, if defendant wished to accept the voluntary manslaughter offer, he did not inform the attorney who appeared with him of his decision. In fact, it is incomprehensible why such an omission would occur. Within one month of his purported decision to accept the voluntary manslaughter offer, defendant appeared in court with a public defender and the trial setting conference was continued. One would expect that defendant would have informed counsel he wanted to

accept the pending offer, so a continuance was unnecessary. The same could be said at the hearing where a trial date was set; why set a trial date if defendant intended to accept the voluntary manslaughter offer?

Therefore, it is clear the issue was not whether the public defender's office inadvertently rejected the voluntary manslaughter offer, but that defendant failed to inform the public defender's office he wished to accept the offer despite at least five opportunities to do so. We also note that Smukler's explanation to the trial court suggested there had been numerous meetings with defendant. Therefore, it is apparent defendant had many more opportunities to inform the public defender's office of his desire to accept the voluntary manslaughter offer, in addition to that which we have documented.

We also reject any suggestion that defendant believed the voluntary manslaughter offer would be available forever. Plea negotiations are a form of contract, and general contract principles apply. (*People v. Segura* (2008) 44 Cal.4th 921, 930-931.) An offer lapses if it is not accepted within a reasonable time. (Civ. Code, § 1587, subd. (b).) The voluntary manslaughter offer was communicated to defendant in November, 2014. He did not inform anyone of his purported decision to accept the offer until July 2015, eight months after the offer was made. Since the evidence unequivocally established that the prosecutor refused to re-present the voluntary manslaughter offer when the issue was broached by Smukler, the inevitable conclusion is that the prosecutor would have argued the offer lapsed because defendant did not accept it within a reasonable amount of time.

Finally, we note that defendant could have litigated this issue in the trial court, arguing the offer was never rejected since Prekoski was referring to a prior offer, or that the offer was mistakenly rejected. Instead, defendant chose to accept the second degree murder offer. Therefore, it is difficult to find the public defender's office was ineffective because, but for defendant's decision, it may have been able to establish the voluntary

manslaughter offer was still pending when defendant informed Smukler he chose to accept it.

Turning to the second prong of the *Strickland* analytical framework, we conclude defendant cannot establish he was prejudiced by the alleged ineffectiveness of counsel. The voluntary manslaughter offer included an indeterminate prison term of 50 years to life, and a determinate term of five years. The second degree murder offer resulted in an identical sentence. Therefore, the usual type of prejudice, a more severe sentence, is absent.

Defendant argued in the trial court that he was prejudiced because if he had pled to voluntary manslaughter, instead of second degree murder, he would have a better chance of obtaining parole at the earliest possible time. He was also concerned that a second degree murder conviction would result in defendant being incarcerated in a less desirable facility than he would have been placed if he was convicted of voluntary manslaughter. Appellate counsel argued in his opening brief that defendant would suffer prejudice because he could achieve parole earlier if he were convicted of voluntary manslaughter.

The prosecutor argued there was no prejudice because the parole board focused on defendant's rehabilitation while in prison, not on whether he was convicted of voluntary manslaughter or second degree murder.

Both arguments to establish prejudice presented by defendant are speculative. Assuming the *average* prisoner convicted of voluntary manslaughter is incarcerated for a shorter period of time than the *average* prisoner convicted of second degree murder, such a fact does not establish that *defendant* will be in the same position. His behavior in prison, his efforts to rehabilitate himself, additional charges he may incur, his past crimes, and the facts of these crimes will all undoubtedly affect when, if ever, defendant is released on parole. There is simply no credible evidence in the record to support these arguments.

Nor is there any credible evidence that defendant will receive a less favorable prison placement because of his second degree murder conviction. The speculation of defense counsel does not establish defendant has suffered any prejudice as the result of the claimed ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.